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No. 00-8452

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

DARYL RENARD ATKINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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00-8452
Atkins
v.
Virginia

Capital Case

QUESTIONS PRESENTED

1. In *Lilly v. Virginia*, this Court declared that for purposes of determining whether the Confrontation Clause precludes the admission of a hearsay statement, the admissibility of the self-inculpatory and non-self-inculpatory expressions in that statement should be assessed separately. Must courts determining whether the Due Process clause mandates the admission of a statement under *Green v. Georgia* and *Mills v. Maryland* similarly engage in a separate assessment of the admissibility of the self-inculpatory and non-self-inclupatory expressions in that statement?

2. Did the Supreme Court of Virginia err when, in the sentencing phase of a capital trial, it summarily invoked a state hearsay rule to preclude the defendant from presenting relevant, important, and independently reliable mitigating evidence that the defendant had no other means of presenting to the jury?

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

THE VIRGINIA SUPREME COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT 8

THE VIRGINIA SUPREME COURT'S SECOND GROUND FOR DENYING ADMISSION OF THE EVIDENCE IS CONTRARY TO THE DECISIONS OF THIS COURT 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Atkins v. Commonwealth, 510 S.E.2d 445 (Va. 1999) ("*Atkins I*") ..... *passim*

Atkins v. Commonwealth, 534 S.E.2d 312 (Va. 2000) ("*Atkins II*") ..... *passim*

Boyd v. French, 147 F.3d 319 (4th Cir. 1998),
cert. denied, 525 U.S. 1150 (1999) 14

Buchanan v. Angelone, 522 U.S. 26 (1998) 8

Chambers v. Mississippi, 410 U.S. 284 (1973) 8

Cherrix v. Commonwealth, 513 S.E.2d 642 (Va.),
cert. denied, 528 U.S. 873 (1999) 7, 10

Coppola v. Commonwealth, 257 S.E.2d 797 (Va. 1979),
cert. denied, 444 U.S. 1103 (1980) 7, 10

Crane v. Kentucky, 476 U.S. 683 (1986) 9

Cunningham v. Peters, 941 F.2d 535 (7th Cir. 1991)
cert. denied, 503 U.S. 940 (1992) 12

Eddings v. Oklahoma, 455 U.S. 104 (1982) 8, 9

Franklin v. Lynaugh, 487 U.S. 164 (1988) 15

Green v. Georgia, 442 U.S. 95 (1979) (*per curiam*) 8, 10

Hitchcock v. Dugger, 481 U.S. 393 (1987) 8

Hutchins v. Garrison, 724 F.2d 1425 (4th Cir. 1983)
cert. denied, 464 U.S. 1065 (1984) 14

Lilly v. Virginia, 527 U.S. 116 (1999) 16

Lockett v. Ohio, 438 U.S. 586 (1978) 8, 9

Lockhart v. McCree, 476 U.S. 162 (1986) 15

Mills v. Maryland, 486 U.S. 367, 375 (1988) 8, 9

Miranda v. Arizona, 384 U.S. 436 (1966) 4, 6, 11, 17

O'Dell v. Commonwealth, 364 S.E.2d 491 (Va.),
cert. denied, 488 U.S. 871 (1988) 7, 10

Penry v. Lynaugh, 492 U.S. 302 (1989) 8, 15

Riggins v. Nevada, 504 U.S. 127 (1992) 16

Rock v. Arkansas, 483 U.S. 44 (1987) 9

Rogers v. Commonwealth, 410 S.E.2d 621 (1991) 5

Romano v. Oklahoma, 512 U.S. 1 (1994) 10

Skipper v. South Carolina, 476 U.S. 1 (1986) 8, 9

Stockton v. Virginia, 402 S.E.2d 196 (Va.),
cert. denied, 502 U.S. 902 (1991) 7

Washington v. Texas, 388 U.S. 14 (1967) 9

CONSTITUTIONS, STATUTES, AND RULES

U.S. CONST. amend. VIII 2, 9

U.S. CONST. amend. XIV 2, 8, 9

28 U.S.C. § 1257(a) 2

Virginia Code § 19.2-264.2 6

Virginia Code § 19.2-264.4 ..... 7, 13

Virginia Code § 19.2-264.5 7

Virginia Code § 19.2-299 7

MISCELLANEOUS

Garvey, Stephen P., *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998) 15

Geimer, William S., & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 51-53 (1987-88) 16

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PETITION FOR A WRIT OF CERTIORARI

Daryl Renard Atkins respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia affirming the imposition of a sentence of death.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia upholding Atkins' conviction for capital murder but remanding for a new sentencing trial is published at *Atkins v. Commonwealth*, 510 S.E.2d 445 (Va. 1999) ("*Atkins I*"), and is reprinted in the accompanying Appendix ("App.") at 1-16. The opinion of the Supreme Court of Virginia on resentencing affirming imposition of a death sentence is published at *Atkins v. Commonwealth*, 534 S.E.2d 312 (Va. 2000) ("*Atkins II*"), and is reprinted at App. 17-34.

JURISDICTION

The Virginia Supreme Court issued its final judgment affirming the death sentence on September 15, 2000. Atkins filed a timely petition for rehearing, which the State court denied on November 3, 2000. App. 35. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution, which provide in relevant part as follows:

> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. amend. VIII.
>
> No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

The facts of the crime, as stated by the Virginia Supreme Court in the light most favorable to the Commonwealth, are as follows:

> On the afternoon of August 16, 1996, William A. Jones* and Atkins were "drinking and smoking weed" at the home Atkins shared with his father. During the course of that afternoon, "[a] couple of [Atkins'] friends came by, in and out." On several occasions during the afternoon and later that evening, those present pooled their money, and Atkins and Jones walked to a nearby convenience store to buy beer or were driven by one of Atkins' friends to an ABC store to buy liquor.
>
> That evening between 10:30 and 11:00 p.m., a friend of Atkins, known to Jones only as "Mark," arrived at the home. Mark had brought a handgun with him

* Prior to Atkins' trial, Jones entered into a plea agreement with the Commonwealth dated September 5, 1997, in which Jones agreed to testify against Atkins in exchange for a reduction in the charges against him arising out of the murder of Nesbitt.

> and gave it to Atkins after Atkins said "that he wanted to use it, he would bring it back in the morning." A short time later, Atkins and Jones again walked to the convenience store to buy beer. Atkins told Jones that he did not have enough money and was going to "panhandle and get some change up." Atkins had the handgun he had borrowed from Mark tucked behind the waistband of his pants, partially concealed by his belt buckle.
>
> While Jones waited, Atkins approached several people to ask for money and collected some from one or two. Nesbitt, who was a stranger to Atkins, arrived at the store in his truck at approximately 11:30 p.m. After a brief conversation with Atkins, Nesbitt went into the store. When Nesbitt returned to his truck and was preparing to leave the parking lot, Atkins "whistled" at him and Nesbitt stopped his truck.
>
> Atkins went to the passenger's side of the truck and Jones went to the driver's side. Atkins then pointed the handgun at Nesbitt and ordered Nesbitt to "[m]ove over, let my friend drive." Jones entered the truck from the driver's side and Atkins entered from the passenger's side.
>
> As Jones drove the truck away from the convenience store, Atkins demanded that Nesbitt surrender his wallet. Atkins removed $60 from the wallet and was returning it to Nesbitt when he noticed a bankcard inside the wallet. On Atkins' instruction, Jones drove to a branch of Crestar Bank where Atkins forced Nesbitt to withdraw $200 using the bankcard from the bank's drive-through automatic teller machine. The security camera in this automatic teller machine recorded the truck arriving at the bank shortly after midnight on August 17, 1996. The videotape produced by the camera showed that Jones was driving, Atkins was in the passenger seat, and Nesbitt was between them. Nesbitt had to lean across Jones in order to operate the machine. During this entire time, Atkins kept the handgun pointed at Nesbitt.
>
> Jones then drove to the parking lot of a nearby school where he and Atkins discussed what they should do with Nesbitt. Jones urged Atkins to "just tie him up so we can get away." Atkins told Jones he knew of a place near his grandfather's house in Yorktown where they could leave Nesbitt and directed Jones to drive toward Yorktown on Interstate 64. Nesbitt asked them "just don't hurt me" and made no attempt to escape.
>
> Upon arriving in a secluded area of York County off the Lee Hall exit of Interstate 64, Atkins exited the truck and ordered Nesbitt to do the same. "Nesbitt stepped out of the vehicle and probably took two steps" when Atkins began shooting him. Jones attempted to exit the truck because he feared that some of the shots were "coming in the truck." Unable to open the driver's side door, Jones rolled down the

driver's side window and "jumped" out of the truck.

Jones began to struggle with Atkins for the handgun and Atkins was shot in the leg during that struggle. After Jones obtained the handgun, he drove Atkins to the emergency room of a local hospital, leaving Nesbitt's dead body at the scene of the shooting. Outside the emergency room, Jones asked Atkins for some of the money that had been taken from Nesbitt and then drove away alone in Nesbitt's truck.

After leaving Atkins at the emergency room, Jones drove to a motel in Newport News where he abandoned Nesbitt's truck. Jones spent the next several days moving from motel to motel. He cut his hair in an attempt to disguise his appearance. Jones subsequently returned to the first motel, where police, who previously had discovered the abandoned truck at the motel and were maintaining a surveillance of the area, arrested him. The handgun was not found in the truck and was never recovered.

* * *

Investigator Frederick T. Lyons, a member of the major crimes section of the York County Sheriff's Office, . . . obtained still photographs and the videotapes from the automatic teller machines' security cameras and distributed copies to local police and media.

> After the media broadcast the photographs, several callers to a "crime line phone number" identified Jones as the driver of Nesbitt's truck. One caller told police that "a person that Mr. Jones runs with was a Daryl Atkins." Based upon these identifications, Lyons obtained an arrest warrant for Jones. After interviewing Jones' father and the father's girlfriend, Lyons "learned that Mr. Atkins was with William Jones," and obtained Atkins' address. Finding Atkins at home, Lyons was able to identify Atkins from the security camera photographs and placed him under arrest.

Atkins I, 510 S.E.2d at 449-51, App. 5-7 (brackets in original; footnote in original).

After Atkins was arrested and advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), he quickly cooperated with the police. He gave a 31-page statement to Lyons in which he acknowledged his participation in the abduction, the robbery, and the murder, although he denied being the actual triggerman.[1] App. 48, 51-52, *see generally* App. 36-82. At trial, Atkins tried to

[1]Except in a case of murder for hire, only the actual triggerman may be convicted of capital murder in Virginia. Other participants in the homicide may be convicted of first degree murder, for

cross-examine Lyons to bring out the substance of Atkins' statement to the police. App. 37-39. The prosecutor objected that any discussion by Lyons about Atkins' statement would be inadmissible as hearsay, App. 39-40, and the trial court agreed. App. 72-75. Atkins then took the stand and testified to the same information himself. App. 99-101. On direct review, the Virginia Supreme Court upheld the restriction on Lyons' testimony:

> On August 21, 1996, Atkins voluntarily gave a statement to Investigator Lyons in which Atkins admitted his participation in the abduction, robbery, and murder of Nesbitt. In that statement, however, Atkins denied that he had been the "triggerman" and asserted that Jones alone had shot Nesbitt. At trial, during cross-examination of Lyons, Atkins' counsel attempted to elicit testimony from Lyons that Atkins' statement contained this denial and assertion. The Commonwealth objected on the ground that, while the statement inculpated Atkins as a participant in these crimes, Atkins' denial that he was the "triggerman" was self-serving and inadmissible hearsay. The trial court ultimately sustained that objection and cautioned the jury to disregard any reference to this statement.
>
> Subsequently during his [own] testimony, Atkins was permitted to reference the content of this statement in great detail [because it came within the hearsay exception for a prior consistent statement].

Id. at 455, App. 12-13 (brackets added).

The jury found Atkins guilty of capital murder and fixed his sentence at death. The Virginia Supreme Court upheld the conviction, but it vacated the death sentence because of a serious defect in the penalty phase verdict forms, and it remanded for redetermination of the appropriate penalty. *Id.* 456-57, App. 14-16.

At the resentencing trial, the prosecutor presented testimony from live witnesses to bring the new jury up-to-speed about the circumstances of the offense and the fact of Atkins' guilt. The

which the maximum penalty is life without parole. *See Rogers v. Commonwealth*, 410 S.E.2d 621 (1991). At the time Atkins acknowledged participation in the homicide, he was charged with first degree felony murder — an offense that applies equally to the triggerman and nontriggerman. The homicide charge subsequently was raised to capital murder. App. 42.

prosecution also presented evidence relating to both of the aggravating factors provided by Virginia law: (i) that the crime was outrageously or wantonly vile, and (ii) that there was a probability Atkins would commit criminal acts of violence in the future. *See* Virginia Code § 19.2-264.2.

Atkins called Lyons as his own witness and attempted to elicit from him the mitigating fact that he (Atkins) had made an inculpatory statement very shortly after he was arrested in which agreed to cooperate with the police, promptly acknowledged participation in the offense, and demonstrated remorse. App. 107-110. On objection by the prosecution, the trial court summarily held that this testimony was inadmissible hearsay. The court based its decision on a perceived need to be consistent with its prior ruling at the guilt phase of the first trial. App. 110, 117. The Virginia Supreme Court affirmed the trial court's exclusion of this evidence on two related grounds. First, the State court held that testimony relating to Atkins' statement was inadmissible because it was hearsay.

> [D]uring direct examination, Atkins' counsel asked Lyons, "[A]fter you advised [Atkins] of [his *Miranda*] rights, did [Atkins] confess to you his involvement in the murder of Eric Nesbitt?" According to Atkins, the information that he sought to elicit by that question was the fact that he had admitted his participation in the murder of Nesbitt. Atkins argues that such information was relevant to the issues of Atkins' remorse and his cooperation with law enforcement authorities, both of which are proper subjects of mitigating evidence.
>
> The Commonwealth objected to the question, contending that it called for a hearsay statement. The Commonwealth also noted that, while Atkins confessed to Lyons his involvement in the abduction, robbery, and murder of Nesbitt, Atkins denied that he was guilty of capital murder. In the confession to Lyons, Atkins maintained that his accomplice alone was the "triggerman." Thus, according to the Commonwealth, for Lyons to appropriately answer the propounded question, he would have to tell the jury that Atkins denied that he pulled the trigger, which would have been contrary to the circuit court's prior ruling that evidence regarding Atkins' guilt would not be admitted at the resentencing hearing.
>
> The circuit court sustained the Commonwealth's objection on the basis that the testimony being elicited from Lyons was hearsay. We agree.

> In Atkins' initial appeal to this Court, we considered this same evidence and held that no exception to the hearsay rule applied which would allow Lyons to testify about the content of Atkins' statement to him. *Atkins*, 257 Va. at 176, 510 S.E.2d at 455. The proffer of this evidence at the resentencing hearing does not change the hearsay analysis. According to Code § 19.2-264.4(B), mitigating evidence relevant to sentencing is "subject to the rules of evidence governing admissibility." *See Cherrix v. Commonwealth*, 257 Va. 292, 309, 513 S.E.2d 642, 653, *cert. denied*, 528 U.S. 873, 120 S. Ct. 177, 145 L. Ed.2d 149 (1999) (subject to rules of evidence governing admissibility, trial court has discretion under Code § 19.2-264.4(B) to determine what evidence may be adduced in mitigation of offense); *Coppola v. Commonwealth*, 220 Va. 243, 253, 257 S.E.2d 797, 804 (1979), *cert. denied*, 444 U.S. 1103, 100 S. Ct. 1069, 62 L. Ed.2d 788 (1980) (same); *but see O'Dell v. Commonwealth*, 234 Va. 672, 701-02, 364 S.E.2d 491, 508, *cert. denied*, 488 U.S. 871, 109 S. Ct. 186, 102 L. Ed.2d 154 (1988) (holding that hearsay evidence contained in postsentence report is admissible based on language of Code §§ 19.2-264.5 and -299).

Atkins II, 534 S.E.2d at 315, App. 5-6 (footnote omitted).

As the second basis for its decision, the State court held that testimony relating to Atkins'–statement was inadmissible because Atkins' guilt was *res judicata* and could not be relitigated in the resentencing proceeding.

> In any event, we believe that the information that Atkins sought to elicit from Lyons improperly would have interjected at the new sentencing hearing a question about Atkins' guilt. In that statement to Lyons, Atkins denied that he was the "triggerman" and accused his accomplice of shooting Nesbitt. *Atkins*, 257 Va. at 175, 510 S.E.2d at 455. As we previously stated, a defendant is not allowed to argue or present evidence of "residual doubt" at a new sentencing hearing. *Stockton* [*v. Virginia*], 241 Va. 192, 211, 402 S.E.2d 196, 207, [*cert. denied*, 502 U.S. 902 (1991)].

Atkins II, 534 S.E.2d at 315, App. 6.

Atkins filed a timely petition for rehearing, which the Virginia Supreme Court summarily denied on November 3, 2000. App. 35.

REASONS FOR GRANTING THE WRIT

I. THE VIRGINIA SUPREME COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

1. In a long-running series of decisions, this Court has affirmed the general principle that in the sentence selection phase of a capital case, "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (citing *Penry v. Lynaugh*, 492 U.S. 302, 317-18 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

On numerous other occasions, the Court has recognized the more specific principle that a state court's evidentiary rulings are not a constitutionally sufficient basis for denying, on a *per se* basis, a capital defendant's right to present mitigating evidence that relates to his character or record or to the circumstances of the offense. "Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio, supra; Hitchcock v. Dugger*, 481 U.S. 393 (1987); by the sentencing court; *Eddings v. Oklahoma, supra;* or by an evidentiary ruling, *Skipper v. South Carolina*, [476 U.S. 1 (1986)]." *Mills v. Maryland*, 486 U.S. 367, 375 (1988) (emphasis added).

As this Court explained in *Green v. Georgia*, 442 U.S. 95, 97 (1979) (*per curiam*), with respect to the defendant's mitigating testimony in a capital case, "Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment." *See also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("[T]he [state's] hearsay rule may not be applied

mechanistically to defeat the ends of justice."); *Rock v. Arkansas*, 483 U.S. 44 (1987) (state's evidentiary rule cannot be applied in *per se* manner to prevent criminal defendant from testifying in his own defense); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (state evidentiary rule cannot be applied in manner that denies criminal defendant's right to present a defense); *Washington v. Texas*, 388 U.S. 14 (1967) (state rule prohibiting co-defendants from testifying for one another cannot be applied to prevent criminal defendant from introducing accomplice's testimony that accomplice had in fact committed the crime).

This Court should grant certiorari because the decision of the Virginia Supreme Court conflicts with the foregoing decisions. Atkins argued on direct appeal that under *Mills*, *Lockett*, *Eddings*, *Skipper*, and *Crane*, a state's evidentiary rule could interpose no barrier to the sentencer's consideration of mitigating evidence. App. 132-33. Yet the State court's analysis reflects no consideration of the principle that in the sentencing phase of a capital case, the Eighth and Fourteenth Amendments limit the broad discretion that state courts ordinarily exercise over the admission and exclusion of evidence. The State court undertook no analysis of whether the Due Process Clause mandated admission of mitigating evidence in the penalty phase of a capital case, notwithstanding the State evidentiary rule precluding the defendant from presenting hearsay testimony concerning his prior statements.[2]

Atkins certainly does not suggest, and this Court has not held, that the States must give up wholesale their sovereign prerogative to regulate the presentation of evidence in the sentencing phase

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[2]As the prosecutor correctly explained to the trial court, Virginia's common-law rules of evidence allow the State to present evidence relating to a defendant's prior statements without regard to the fact that it is hearsay. The defendant, however, may present evidence relating to his prior statements only if it comes within the hearsay exception for prior consistent statements. App. 45.

of a capital case. *See Romano v. Oklahoma*, 512 U.S. 1, 12 (1994) ("The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing."). Rather, as this Court narrowly has explained, a state's evidentiary rules cannot *per se* preclude the admission of mitigating evidence at a capital sentencing trial when that evidence could not be presented through non-hearsay testimony and when "substantial reasons exist[] to assume its reliability." *Green*, 422 U.S. at 97. The Virginia Supreme Court employed a *per se* policy.

On independent examination of the hearsay statement proffered in *Green*, this Court identified several facts that cloaked the mitigating evidence in that case with sufficient indicia of reliability to mandate admission. For example, the declarant had made the statement spontaneously to a close friend. The statement was against the declarant's penal interest. There was ample evidence to corroborate the statement. And the prosecution previously had considered the out-of-court statement sufficiently reliable that it had used it against the declarant in another proceeding to obtain a conviction and death sentence. *Id.*

In Atkins' case, the Virginia Supreme Court did not examine or advert to either the relevance or reliability of the mitigating hearsay statement. Indeed, that court does not appear ever to have examined whether relevant hearsay evidence was reliable when proffered by the defendant in the penalty phase of a capital trial.[3]

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[3]In *Cherrix* and *Coppola*, which it cited in *Atkins II*, the Virginia Supreme Court rejected the defendant's proffered non-hearsay testimony because it fell outside the definitional scope of mitigating evidence, not because the evidence was examined and found to be unreliable. In *O'Dell*, the State court made a blanket ruling that hearsay statements in a presentence report are admissible at a capital sentencing proceeding. The court did not base this ruling on any inquiry into the reliability of hearsay statements in presentence reports. Rather, it said that the common-law hearsay rule was trumped by statutes that specifically required submission of presentence reports and authorized the officers who prepared such reports "to thoroughly investigate and report upon the history of the accused and any other and all other relevant facts." *O'Dell*, 364 S.E.2d at 508.

If the State court had followed this Court's decisions and conducted a reliability inquiry, it would have found that the limited information Atkins sought to elicit from Lyons was reliable. That information — that when Atkins was advised of his *Miranda* rights, he promptly acknowledged participating in the abduction, the robbery, and the murder — was against Atkins' penal interest. The fact that Atkins had agreed to cooperate with law enforcement authorities and quickly acknowledged participating in these offenses was corroborated by the 31-page statement itself.[4] The truthfulness of the information Atkins sought to elicit was corroborated by the fact that before the first capital murder trial, Atkins pleaded guilty to the predicate charges of robbery and abduction. *Atkins I*, 510 S.E.2d at 447 n.1, App. 4. In the guilt phase of the capital murder trial, the Commonwealth argued, and the jury found, that Atkins participated in the murder. Moreover, the Commonwealth had the opportunity in the guilt phase of the first trial to test the reliability of the statement by cross-examining Atkins. Thus, there were substantial reasons to assume the reliability of the limited portion of the hearsay testimony that Atkins wanted to elicit in the penalty phase of the resentencing trial. Indeed, there was absolutely no basis on which anyone could conclude that Atkins did *not* participate in the abduction, the robbery, and the murder, and no basis on which anyone could conclude that Atkins did *not* quickly acknowledge participation and agree to cooperate when he was arrested.

2. Atkins circumvented the hearsay problem at the guilt phase of his original trial by testifying on his own behalf and relating the substance of the statement he had given to Lyons. That option was not available to Atkins at the resentencing proceeding before the new jury. The

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[4]Because of the trial court's rulings, Atkins' 31-page statement was never offered into evidence. It is not a part of the trial record.

resentencing trial court, viewing Atkins' guilt as *res judicata*, had imposed an across-the-board prohibition on any "inquir[y] into, comment upon or argu[ment about] any factual issue relative to [Atkins'] guilt. *Atkins II*, 534 S.E.2d at 315 n.3.

As demonstrated in more detail in Section II *infra*, both the trial court and the Virginia Supreme Court considered any reference to Atkins' statement to be an inquiry into or comment upon his guilt because the statement, taken as a whole, included Atkins' denial that he was the triggerman. Thus, although Atkins did not attempt to testify about his statement at the resentencing, there is no doubt that if he had tried to do so, the trial court would have ruled that his testimony was inadmissible, and the Virginia Supreme Court would have agreed.[5] Put more simply, regardless whether Atkins attempted to elicit information about his statement from Lyons or from the defendant, that testimony was still — in the State court's opinion — improper and beyond the scope of the resentencing trial because the statement as a whole included a denial that Atkins was the triggerman.

3. Recognizing the necessarily fact-specific nature of this Court's prior decisions in cases that pit state evidentiary rules against the imperative of the Due Process Clause, some courts have mirrored this Court's approach and conducted a case-by-case analysis in which they balance the interests of the parties. *See, e.g., Cunningham v. Peters*, 941 F.2d 535, 538 (7th Cir. 1991) ("Our task is to evaluate the exculpatory significance of relevant and competent evidence and then balance it against the competing state interest in the procedural rule that prevented the defendant from

[5]By negative implication, the Virginia Supreme Court confirmed that Atkins would not have been allowed to testify about his statement if he had taken the stand at the resentencing trial. In *Atkins I*, 510 S.E.2d at 455, App. 13, the court emphasized that "no prejudice resulted to Atkins" from the restriction on Lyons' testimony, because Atkins was able to present the same evidence through his own testimony. In *Atkins II*, by comparison, the court did not make the parallel suggestion that the restriction was harmless at the resentencing trial because Atkins could have presented the same mitigating testimony himself.

presenting this evidence at trial."), *cert. denied*, 503 U.S. 940 (1992)..

The Virginia Supreme Court did not perform a balancing test. This Court should grant certiorari to provide guidance and ensure uniformity among the state courts of last resort and the lower federal courts concerning the standards or methods to apply when a criminal defendant contends that exclusion of mitigating evidence would violate the Due Process Clause.

If the Virginia Supreme Court had employed a balancing test, it would have recognized that the State's interests in excluding the mitigating evidence were minimal in Atkins' case. The only concern of any weight on the State's side of the scale was its interest in the uniform application of its rules governing the presentation of evidence. The State may have had an interest in keeping the jury focused on the question of punishment rather than the question of guilt but, as Atkins has explained elsewhere in this petition, it was not necessary to re-open the question of guilt in order to admit the limited information that Atkins wanted to elicit. The State also had an interest in this case, as it has in all cases, in excluding evidence that is irrelevant or unreliable. As Atkins has explained elsewhere in this petition, there was nothing irrelevant or unreliable about the limited information Atkins wanted to elicit at the resentencing.

On Atkins' side of the balance was his interest in presenting truthful, noncumulative evidence about his character that might convince at least one juror to vote for a sentence of life imprisonment rather than death.[6] As this Court and the lower federal courts both have recognized, this is an interest of great weight. "'[T]he Supreme Court has been very sensitive to any impediment to the consideration of any type of mitigating evidence in a death sentencing hearing. . . . [S]ubject only to

[6]"In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life." Virginia Code § 19.2-264.4(E).

the loose evidentiary requirement of relevance, capital defendants have a right to offer any evidence they choose on character or record or circumstances of the offense.'" *Boyd v. French*, 147 F.3d 319, 326 (4th Cir. 1998) (quoting *Hutchins v. Garrison*, 724 F.2d 1425, 1437 (4th Cir. 1983), *cert. denied*, 464 U.S. 1065 (1984)), *cert. denied*, 525 U.S. 1150 (1999). Atkins also had an interest in rebutting the aggravating factor of future dangerousness by presenting truthful information about his character.

Under this Court's precedents, Atkins' interests were easily superior to the State's formalistic desire to have its rule of evidence applied in the same manner in both the guilt and penalty phases of a capital trial. The Court should grant certiorari because the Virginia Supreme Court's decision conflicts with this Court's decisions regarding the right to present mitigating evidence and the circumstances under which the Due Process Clause takes precedence over a state's rules of evidence in the penalty phase of a capital case.

II. THE VIRGINIA SUPREME COURT'S SECOND GROUND FOR DENYING ADMISSION OF THE EVIDENCE IS CONTRARY TO THE DECISIONS OF THIS COURT.

In addition to its ruling that the testimony Atkins wished to present was hearsay, the Virginia Supreme Court held that the testimony was inadmissible because Atkins' confession, taken as a whole, included the statement that Jones, rather than Atkins, was the triggerman. In the State court's view, the identity of the triggerman was *res judicata* and thus not a matter that the resentencing jury could be permitted to consider. "[W]e believe that the information that Atkins sought to elicit from Lyons improperly would have interjected at the new sentencing hearing a question about Atkins' guilt." *Atkins II*, 534 S.E.2d at 315, App. 6.

For purposes of this petition, Atkins assumes that state courts may properly exclude from a

resentencing hearing any evidence whose sole function is to raise a residual doubt about the defendant's guilt. *See Penry v. Lynaugh*, 492 U.S. 302, 320 (1989) (stating that in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), "a majority agreed that 'residual doubt' as to Franklin's guilt was not a constitutionally mandated mitigating factor."). [7] In other words, Atkins assumes that a state court properly may limit the resentencing trial to (i) evidence establishing or rebutting the aggravating factors and (ii) mitigating evidence concerning the defendant's character or record or the circumstances of the offense. This is true even though the jury at a unitary trial, having heard competing evidence concerning the defendant's guilt, might be moved by residual doubt to impose a life sentence rather than a death sentence. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998) (reporting that in jury studies, residual doubt about defendant's guilt was most important reason given for choosing life sentence rather than death sentence); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 357 n.236 (noting that lingering doubt about defendant's guilt is sometimes strongest factor in jury's decision to impose life sentence); *cf. Lockhart v. McCree*, 476 U.S. 162, 181 (1986) (observing that criminal defendants can benefit in penalty phase of capital cases that are tried before unitary juries).

In the instant case, the State has never disputed that Atkins promptly gave a statement to Lyons in which he acknowledged that he had participated in the abduction, the robbery, and the murder of Eric Nesbitt. The State also has never disputed that this admission was relevant to Atkins'

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[7] Justice O'Connor has defined "residual doubt" as "a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'" *Franklin*, 487 U.S. at 188 (O'Connor, J., concurring in judgment). Justice O'Connor explained that this lingering uncertainty does not come within the scope of proper mitigating evidence because it "is not a fact about the defendant or the circumstances of the crime." *Id.*

remorse, his acceptance of responsibility, and his willingness to cooperate with law enforcement authorities. The Virginia Supreme Court correctly recognized that these are proper subjects of mitigation evidence. *Atkins II*, 534 S.E.2d at 315, App. 5. As this Court recognized, "[i]n a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." *Riggins v. Nevada*, 504 U.S. 127, 143-144 (1992) (Kennedy, J., concurring in judgment) (citing William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 51-53 (1987-88)).

The Virginia Supreme Court's exclusion of Lyons' testimony was based on its failure to parse Atkins' statement into its component parts and to consider separately the admissibility of each part. In this regard, the State court's error is analytically analogous to the error that this Court identified in *Lilly v. Virginia*, 527 U.S. 116 (1999). In *Lilly*, this Court pointed out that the declarant's out-of-court statement contained both self-inculpatory and non-self-inculpatory expressions. In the self-inculpatory portion the declarant, Mark Lilly, acknowledged his participation in the robbery and murder. In the non-self-inculpatory portion, Mark Lilly asserted that his brother, Benjamin Lilly, was the triggerman. As this Court carefully explained, the fact that the self-inculpatory portions of the statement were credible, and thus admissible, did not justify admission of the separate non-self-inculpatory (and non-credible) portions of the hearsay statement. *Id.* at 139 (opinion of Stevens, J.); *id.* at 144 (Rehnquist, C.J., concurring in judgment).

In Atkins' case, the declarant's out-of-court statement similarly included the self-inculpatory admission that Atkins participated in the abduction, the robbery, and the murder of Nesbitt. It also included the non-self-inculpatory declaration that Jones, rather than Atkins, was the triggerman.

Under this Court's precedents, the self-inculpatory part of the statement was mitigating and admissible. The non-self-inculpatory part of the statement, on the other hand, was irrelevant to any issue properly before the resentencing court, and for purposes of this petition, Atkins does not dispute its exclusion.

Significantly, Atkins wanted to elicit information at the resentencing only about the mitigating part of the statement. App. 107-110. Information about that part of Atkins' statement was important, relevant, independently reliable, and admissible under this Court's precedents. When counsel called Lyons as a defense witness and asked, "[A]fter you advised [Atkins] of [his *Miranda*] rights, did [Atkins] confess to you his involvement in the murder of Eric Nesbitt," *Atkins II*, 534 S.E.2d at 315, App. 5, Lyons properly could have testified that Atkins promptly acknowledged participating in the abduction, acknowledged participating in the robbery, and acknowledged participating in the murder. Period. Lyons, who was called in his capacity as a nonhostile witness for the defense, App. 106A-07, need not (and likely would not) have volunteered on direct examination the separate and nonresponsive information that Atkins denied being the actual triggerman.[8]

The Court should grant certiorari to confirm that the standards for assessing hearsay statements under the Due Process Clause are analogous to the standards for assessing hearsay statements under the Confrontation Clause when the statements at issue include both self-inculpatory and non-self-inculpatory expressions.

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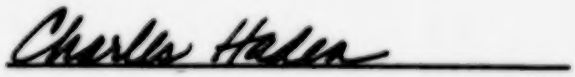
[8]On cross-examination of Lyons, of course, the prosecution could have chosen to explore the limits of Atkins' acceptance of responsibility as evidenced by his denial of being the triggerman — not to relitigate any issue relating to guilt but to try to diminish the weight of the mitigating evidence.

CONCLUSION

In two separate but related respects, the Virginia Supreme Court rendered a decision that is in conflict with this Court's precedents. For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,



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